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Supreme Court, U. S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

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No. 72-1187

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M. BROWNING COMBS, ET AL, *Petitioners*

*v.*

PRINCESS RANOLA JOHNSON, ET AL, *Respondents*

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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## Petitioners' Reply Brief

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### PETITIONER'S REPLY BRIEF

Respondents' brief in opposition to Petitioners' Petition for writ of certiorari highlights one critical error of law by the trial court and the Court of Civil Appeals for the Fifth Circuit, i.e. the error of applying an "irrefutable presumption of discrimination" evidentiary standard to a school district with the history of a dual system that had one primarily black elementary school.

Respondents in their opposing brief rely on *Flax v. Potts*, 464 F2d 865 (5th Cir., 1972) certiorari denied, ..... U.S. ....., 34 L.Ed.2d 299 (1973), as follows: "The court of appeals found that in light of the history of state-imposed segregation as it affects a school district,

the existence of one-race schools is presumptively discriminatory" (Respondents' Opposition Brief, p. 6).

The trial court felt bound by the law of the Fifth Circuit under *Cisneros v. Corpus Christi Independent School District*, 467 F2d 142 (5th Cir., 1972) and *Flax*, that the existence of a primarily one-race school in a school district with a history of a dual system, created an irrefutable presumption that the offending school was the result of de jure segregation, and, therefore, the school district, without regard to the evidence, could not be "unitary." The district court's error in following the "irrefutable presumption of discrimination" standard is clear from the following language from the district court opinion:

> The District urges that it did desegregate Dalworth in 1965, and that subsequent residential patterns are responsible for the school's present racial composition. This argument might have merit if Dalworth had ever been truly desegregated, but Dalworth has never been racially integrated and residential patterns can be no defense to the existence of one-race schools in a system which has never been operated in a unitary manner. Flax v. Potts, ..... F.2d ..... (5th Cir., July 14, 1972, No. 71-2715); Cisneros v. Corpus Christi Independent School District, ..... F.2d ..... (5th Cir., August 2, 1972, No. 71-2397). The District's argument is therefore rejected.

The application of the "irrefutable presumption of discrimination" standard is readily apparent from the record in the case which reflects that contrary to the overwhelming evidence of school compliance with Con-

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stitutional desegregation standards, the respondents failed to introduce a shred or a scintilla of direct evidence as to discrimination on the part of the school district.

## UNIFORM RULES OF EVIDENCE OF RACIAL DISCRIMINATION [20 U.S.C. §1655]

Public Law 92-318, Section 805, 20 U.S.C. §1655 (The Education Amendments of 1972 under which Respondents claim attorneys' fees pursuant to §718) provides:

> Sec. 805. The rules of evidence required to prove that state or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States.

If the above legislation be constitutional, the "irrefutable presumption of discrimination" standard applied by the trial court and the Court of Appeals for the Fifth Circuit, and peculiar to the Fifth Circuit, was wrong, certiorari should be granted, the case reversed and no attorneys' fees allowed. Indeed, the above legislation does away with presumptions sought to be applied regionally. The above legislation became effective July 1, 1972. The decision of the trial court in this case was rendered on August 22, 1972. *Flax* and *Cisneros* were decided by the Court of Appeals for the Fifth Circuit without reference to the Education Amendments of 1972.

The "irrefutable presumption of discrimination"

standard applied by the trial court was erroneous with or without regard to the above legislation.

The intent of Congress that there shall not be one law and standard of evidence for the South, and one law for the rest of the country are set forth in the above and other sections of the Education Amendments of 1972, which are hereinafter set forth, together with the codification reference. These sections of Public Law 92-318 which also militate against Respondents' position and the grant of attorneys' fees herein are Sections 719, 20 U.S.C. §1618; Section 801, 20 U.S.C. §1651; Section 802, 20 U.S.C. §1652; and Section 806, 20 U.S.C. §1656:

## NEIGHBORHOOD SCHOOLS
## [20 U.S.C. §1618]

Sec. 719. Nothing in this title shall be construed as requiring any local educational agency which assigns students to schools on the basis of geographic attendance areas drawn on a racially nondiscriminatory basis to adopt any other method of student assignment.

## PROHIBITION AGAINST ASSIGNMENT OR TRANSPORTATION OF STUDENTS TO OVERCOME RACIAL IMBALANCE
## [20 U.S.C. §1651]

Sec. 801. No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

## PROHIBITION AGAINST USE OF APPROPRIATED FUNDS FOR BUSING [20 U.S.C. §1652]

Sec. 802(a). No funds appropriated for the purpose of carrying out any applicable program may be used for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to overcome racial imbalance in any school or school system, or for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to carry out a plan of racial desegregation of any school or school system, except on the express written voluntary request of appropriate local school officials. No such funds shall be made available for transportation when the time or distance of travel is so great as to risk the health of the children or significantly impinge on the educational process of such children, or where the educational opportunities available at the school to which it is proposed that any such student be transported will be substantially inferior to those opportunities offered at the school to which such student would otherwise be assigned under a nondiscriminatory system of school assignments based on geographic zones established without discrimination on account of race, religion, color, or national origin.

(b) No officer, agent, or employee of the Department of Health, Education, and Welfare (including the Office of Education), the Department of Justice, or any other Federal agency shall, by rule, regulation, order, guideline, or otherwise (1) urge, persuade, induce, or require any local education agency, or any private nonprofit agency,

institution, or organization to use any funds derived from any State or local sources for any purpose, unless constitutionally required, for which Federal funds appropriated to carry out any applicable program may not be used, as provided in this section, or (2) condition the receipt of Federal funds under any Federal program upon any action by any State or local public officer or employee which would be prohibited by clause (1) on the part of a Federal officer or employee. No officer, agent, or employee of the Department of Health, Education, and Welfare (including the Office of Education) or any other Federal agency shall urge, persuade, induce, or require any local education agency to undertake transportation of any student where the time or distance of travel is so great as to risk the health of the child or significantly impinge on his or her educational process; or where the educational opportunities available at the school to which it is proposed that such student be transported will be substantially inferior to those offered at the school to which such student would otherwise be assigned under a nondiscriminatory system of school assignments based on geographic zones established without discrimination on account of race, religion, color, or national origin.

(c) An applicable program means a program to which the General Education Provisions Act applies.

## APPLICATION OF PROVISO OF SECTION 407(a) OF THE CIVIL RIGHTS ACT OF 1964 TO THE ENTIRE UNITED STATES [20 U.S.C. §1656]

Sec. 806. The proviso of section 407(a) of the Civil Rights Act of 1964 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by title IV, under all circumstances and conditions and at all times in every State, district, territory, Commonwealth, or possession of the United States regardless of whether the residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States.

In reply to Respondents' statement of the facts, it should be noted that in 1965 (D. Ex. 9, R. 198) and again in 1968 (D. Ex. 10, R. 199), H.E.W. certified the Grand Prairie Independent School District as being in compliance with the Civil Rights Act of 1964. At least eighty percent of the school children attending the Dalworth Elementary School moved into the Dalworth attendance zone after 1964. The Dalworth Elementary School faculty was 82.35% white and

17.65% black (P. Ex. 8, R. 68, 69, 75). The overall student racial ratio in Dalworth, including special education students, had changed from 100% black to 86.4% black, 13.6% white (D. Ex. 15, R. 208).

## CONCLUSION

There is a conflict in the decisions of the other Courts of Appeal and the law as written by Congress and the irrefutable presumption of discrimination standard applied by the lower courts in this case.

The standard of law applied by the trial court and the Appellate Court being clearly erroneous and the necessity that the law of the United States be applied uniformly demand review of the action below in order that justice be done.

Petitioners pray that certiorari be granted, the holding of the lower courts be reversed, that Respondents be denied attorneys' fees, and that costs herein be assessed against Respondents. Petitioners further suggest that on the record, summary reversal is in order.

Respectfully submitted,

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